

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. E.254/2001

BETWEEN	JAMES HENRY CHISHOLM	APPLICANT
A N D	NEW FALMOUTH RESORTS LIMITED	1 ST RESPONDENT
A N D	JOHN PHELAN	2 ND INTENDED RESPONDENT
A N D	FRANK PHELAN	3 RD INTENDED RESPONDENT
A N D	CHARLES SWANN	4 TH INTENDED RESPONDENT
A N D	B.B. & B PARTNERSHIP	5 TH INTENDED RESPONDENT

IN CHAMBERS

Mrs. Carol Davis for applicant.

Conrad George instructed by Hart, Muirhead & Fatta
for the Intended Respondents.

Heard: 30th June and 7th July, 2003

M. COLE-SMITH, J. (Ag.)

This is an application by way of summons for leave to join parties and to appreciate its significance it is necessary to rehearse what happened in two previous proceedings.

Firstly on the 20th July 2001 Mr. Justice Marsh made an Order by way of a motion, which was instituted by James Chisholm, a Director, and shareholder of New Falmouth Resorts Limited.

1. That the register of members of the respondent company, New Falmouth Resorts Limited, be rectified by striking out the names of
 - (a) John H. Phelan III of 1224 Americana Building, Houston Texas, U.S.A. therefrom as the holder of 221,681 Preference Shares of the said company numbered 1 to 221,681 inclusive;
 - (b) Frank D. Phelan of 1224 Americana Building, Houston, Texas U.S.A. therefrom as the holder of the 900 Ordinary Shares of the said company numbered 3 to 899 inclusive;
 - (c) Charles H. Swan of 1224 American Building, Houston Texas, U.S.A. therefrom as the holder of the 100 Ordinary Shares of the said company number 900 to 1000 inclusive;
 - (d) B.B. & B Partnership (a U.S. Corporation) of 700 Biltmore Way Coral Gables, Florida, U.S.A. therefrom as the holder of the 52 Ordinary Shares of the said company numbered 1001 to 1052 inclusive;

and by inserting in lieu thereof the name of the applicant, James Henry Chisholm, as the holder of 500 Ordinary Shares numbered 1053 to 1552 and a Director of New Falmouth Resorts Limited.

ON THE GROUNDS THAT the persons and/or entities of (a) through (d) above, were non-residents and did not satisfy the requirements and conditions of the Exchange Control Act at the time of the purported issue of the shares in their names and accordingly do not qualify to be shareholders of the company.

2. That the Director or Secretary of the Respondent Company be authorized to effect the necessary alterations in the said Register for carrying such Order into effect.
3. That notice of such rectification be given to the Registrar of Companies or that such other order may be made in the premises as to the Court shall seem fit.
4. That the said company, its Secretary and all officers and persons purporting to be Directors and/or Shareholders of the company be ordered to pay to the applicant the damages he has sustained by reason of the said company having made default by not entering his name in the said register in respect of the said shares and for that purpose an enquiry be undertaken by the Court;

5. That the Respondent company will be responsible for any damages sustained by the applicant.
6. That the said Respondent company be ordered to pay to the applicant his costs of this application; and
7. Such other relief as to this Honourable Court may seem just.

This application was granted pursuant to Section 352 of the Judicature (Civil Procedure Code) Law.

Secondly on the 12th December 2001 an application was made by Summons on behalf of the third intended respondent who was one of the shareholders in the first motion who was deprived of his shareholding by Mr. Justice Marsh's Order. On this occasion the matter was contested and the issues were fought out between New Falmouth Resorts Limited of which Mr. Chisholm was the dominant shareholder and third intended respondent Frank Phelan who was acting on behalf of all the shareholders who were struck out by Mr. Justice Marsh's Order. The order of Mr. Justice Rattray reads as follows:-

“Application of third intended Respondent refused. Costs to Mr. Chisholm to be paid by the third intended respondent.”

The crucial question Mr. George has posed is that he now has documents from one of the parties. Paragraph 8 of Mr. George's affidavit

states as follows:-

“Such evidence has materialized within the last four weeks. I am told by Mr. James Phelan, Brother of Frank and John Phelan III that in going through the papers of his late brother, John Phelan III, he found the following letters, true copies of which are produced and shown to me marked “CEG 3”.

- (i) copy letter Hugh Hart (reference HH/w Mcg dated 20th May 1968) (Clinton Hart & Company) to the Bank of Jamaica, requesting approval for the purchase of shares by the Phelans.
- (ii) letter First National City Bank dated 9th May 1969 to Mr. Hugh Hart, Clinton Hart & Company, signed by N. Pinchong, Manager;
- (iii) enclosed letter from First National City Bank to Bank of Jamaica dated 9th May 1969, signed by N. Pinchong, Manager, and setting out details of dollar deposits received from John Phelan III and from New Falmouth;
- (iv) Financial statement from New Falmouth dated 31st March 1969;
- (v) copy letter Hugh Hart (reference HH/yc) (Clinton Hart & Company) to the Bank of Jamaica confirming, inter alia lodgment in the Royal Bank of Canada of U.S. \$23,906.25 from John Phelan, lodgment at the Bank of Nova Scotia, Jamaica Limited of \$196,500.00 from John Phelan on behalf of New Falmouth and enclosing the letter from First

National City Bank of 9th May 1969 referring to lodgment of U.S. \$255,035.00.

These documents contain what would appear to be permission sought from the Bank of Jamaica and permission granted by the Bank of Jamaica by way of a letter dated 3rd May, 1972 from Mrs. A. E. Anderson for The Director, Monetary and Foreign Exchange Policy.

This evidence must be crucial in determining the rights of the shareholders who were struck out in the initial proceedings.

I do not have the power to set aside the order of Mr. Justice Rattray although this is a case where in the light of the potential evidence adduced by Mr. George this evidence ought to be considered in any hearing determining the rights of the shareholders struck out by Mr. Justice Marsh's order which was affirmed by Mr. Justice Rattray's order.

Accordingly therefore I am directing that the matter of setting aside Mr. Justice Rattray's order in light of the evidence being adduced should be argued before the Court of Appeal to determine whether the parties seeking to be joined in these proceedings should be so joined.

Section 41 of Judicature (Supreme Court) Act provides:

“A judge of the Supreme Court sitting in the exercise of the civil jurisdiction of the Court may reserve any case, or point in a case, for the consideration of the Court of Appeal, or may direct

any case or point in a case to be argued before the Court of Appeal, and the Court of Appeal shall have the power to hear and determine any such case or point:

Provided that nothing herein shall take away the right of any party to any suit to have the issues for trial by jury submitted and left by the Judge to the jury before whom the same comes for trial, with a proper and complex direction to the jury upon the law and as to the evidence applicable to such issues.”

Order:

1. That the matter of joinder of parties in the light of the evidence be heard and determined by the Court of Appeal.
2. Costs of this hearing to abide the decision of the Court of Appeal.